89-373

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court can order the Environmental Protection Agency to engage in notice and comment rulemaking prior to making a decision not to change existing regulations under § 109(d) of the Clean Air Act, when neither the Clean Air Act nor the Administrative Procedure Act requires notice and comment rulemaking prior to such a decision?

2. Whether the decision of the court below was correct in rejecting the decision of the District of Columbia Circuit in *Oljato Chapter of the Navajo Tribe v. Train*, by holding that a person seeking to challenge an agency's decision not to change its existing standards need not petition the agency for rulemaking and then proceed to the circuit court of appeals under § 307(b) of the Clean Air Act after a denial of the petition, but could instead bring an action in a district court under § 304 of the Clean Air Act to compel rulemaking on such standard revisions?

3. Whether the decision of the court below was correct in rejecting the decision of the District of Columbia Circuit in *Telecommunications Research and Action Center v. FCC*, which precludes district courts from asserting jurisdiction over suits seeking relief that might affect the future jurisdiction of the circuit court of appeals (in this case, the District of Columbia Circuit)?

PARTIES TO THE PROCEEDINGS

This case involves a challenge to the Environmental Protection Agency's (EPA) decision to leave in place the current national ambient air quality standards for sulfur oxides pursuant to § 109 of the Clean Air Act, 42 U.S.C. § 7409 (1982). Alabama Power Company, 59 other individual electric utilities,[1] the Edison Electric Institute, the American Public Power Association, and the National Rural Electric Cooperative Association were intervenor-appellees below, and are petitioners here. Other intervenor-appellees below were Peabody Holding Company, Inc., Peabody Coal Company, American Mining Congress, Asarco Incorporated, and Magma Copper Company.

The plaintiff-appellants below were the Environmental Defense Fund, the Natural Resources Defense Council, the Sierra Club, the National Parks and Conservation Association, the State of New York, the State of Connecticut, the State of New Hampshire, the Commonwealth of Massachusetts, the State of Vermont, and the State of Minnesota. Pursuant to Rule 19.6 of this Court, the plaintiff-appellants and the intervenor-appellees other than Alabama Power Company, *et al.*, are respondents in this Court. William K. Reilly, EPA Administrator, and EPA were defendant-appellees in the proceedings below, and are respondents here.

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[1] A list of the individual companies that comprise Alabama Power Company, *et al.*, and all parent companies, subsidiaries and affiliates is contained in the supplemental appendix attached to this Petition pursuant to Rule 28 of this Court.

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Alabama Power Company, 59 other individual electric utilities,[1] the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 22, 1989.

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals in *Environmental Defense Fund, et al. v. Thomas, et al.*, No. 88-6142 (2d Cir. March 22, 1989), is reported at 870 F.2d 892, and is reprinted in the appendix (hereinafter referred to as "App. —") at p. 1a.

The Opinion of the United States District Court for the Southern District of New York, *Environmental Defense Fund, et al. v. Thomas, et al.*, No. 85 Civ. 9507 (DNE), has not been reported. It is reprinted in the appendix at p. 22a.

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[1] The 59 individual utility petitioners and their parent companies, subsidiaries, and affiliates are set forth in the supplemental appendix attached to the Petition pursuant to Rule 28 of this Court.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was entered on March 22, 1989.[2] A timely Petition for Rehearing was denied on June 8, 1989, over the dissent of Judge Mahoney. App. 49a. This petition for a writ of certiorari is being filed within ninety days of that date pursuant to 28 U.S.C. § 2101(c) (1982) and Rules 20.2 and 20.4 of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are set forth in the Appendix:

1. Administrative Procedure Act § 4; 5 U.S.C. § 553 (1988), App. 51a.
2. Clean Air Act §§ 109, 304(a), 307(b), (d), (e); 42 U.S.C. §§ 7409, 7604(a), 7607(b), (d), (e) (1982), App. 52a.

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[2] The court below heard this case on appeal from a decision of the District Court for the Southern District of New York dismissing the case for lack of jurisdiction. Plaintiffs, the Environmental Defense Fund, *et al.* (hereinafter referred to collectively as "EDF"), had asserted jurisdiction in the district court under § 304(a)(2) of the Clean Air Act, 42 U.S.C. § 7604(a)(2) (1982), which provides district courts with jurisdiction to compel the Administrator of the Environmental Protection Agency ("EPA" or "Agency") "to perform any act or duty under this Act which is not discretionary with the Administrator" and which the Administrator has "fail[ed] . . . to perform." EDF claimed that the Administrator had failed to revise the ambient standard for sulfur oxides to account for specific health and welfare effects. The district court found that revision of ambient standards is discretionary with the Administrator, and therefore not a proper subject of district court jurisdiction. The Second Circuit reversed in part, finding that even though revision of ambient standards is discretionary with the Administrator, the Administrator has a nondiscretionary duty under § 109 of the Act to determine through notice and comment rulemaking whether standard revisions are appropriate. Petitioners here disagree with the Second Circuit's creation of a nondiscretionary duty to conduct rulemaking, and believe that the lower court properly decided that it had no jurisdiction over this case.

STATEMENT OF THE CASE

This case involves a decision of the Administrator of the Environmental Protection Agency (the "Administrator") to leave in place its regulations containing the current national ambient air quality standards (NAAQS) for sulfur oxides. This decision was based on the Administrator's review of recent scientific information regarding potential health and welfare effects of emissions of sulfur oxides. Although the EPA Administrator did nothing to change the existing regulations, the Second Circuit held that his review of new scientific information must be embodied in notice and comment rulemaking procedures, and must result in a formal decision whether or not to maintain the status quo. The statutory and regulatory background of this case is summarized below.

A. The Administrative Procedure Act and the Clean Air Act

Absent an express statutory exception in the Administrative Procedure Act ("APA") or the agency's organic statute, an agency's action to promulgate or to revise rules is governed generally by the APA. The APA defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (1988). Under the APA, rules must be developed through notice and comment rulemaking.[3]

Apart from the APA, Congress prescribed procedures that must be followed to implement specific statutory provisions under the Clean Air Act ("CAA" or "the Act"). For example, the "*promulgation or revision* of any national ambient air quality standard under section 109" of the Act must be accompanied by development of a rulemaking docket and an opportunity for a

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[3] 5 U.S.C. § 553 (1988). While there are specific exceptions to the rulemaking requirement, *see id.* § 553(b), these exceptions are not relevant here.

public hearing, as well as notice and an opportunity for comment.[4]

Neither the APA nor the Clean Air Act, however, prescribes procedures that EPA must follow in making the decision whether or not to revise existing regulations. For example, § 109(d)(1) of the Clean Air Act provides that the Administrator shall review the NAAQS "at five-year intervals," or "more frequently" if he chooses. If he decides, based on that review, to revise the NAAQS, he "shall make such *revisions* . . . as may be appropriate" following rulemaking.[5] Nothing in § 109(d)(1) tells the Administrator that rulemaking must precede a decision *not* to revise the NAAQS.

The Clean Air Act also addresses federal court jurisdiction over Agency action. Section 307(b)(1) of the Act assigns exclusive jurisdiction to the court of appeals to review *any* final action of the Administrator under the Act. A petition to review any national ambient air quality standard or any nationally applicable final action of the Administrator under the Act may be filed only in the Court of Appeals for the District of Columbia Circuit.[6] To emphasize the exclusivity of the jurisdiction of the court of appeals, § 307 provides that "[*n*]*othing in this Act* shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, *except as provided in this section.*" [7]

In contrast to the sweeping and exclusive jurisdiction of the courts of appeals under § 307, the jurisdiction of district courts over claims against the Administrator is

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[4] CAA § 307(d)(1)(A), 42 U.S.C. § 7607(d)(1)(A) (1982) (emphasis added). All citations to the Clean Air Act hereinafter are to sections of the Act. The Table of Authorities contains parallel citations to the United States Code. *See also* CAA § 109 (a), (b) (requiring notice and comment procedures for promulgation and revision of ambient standards).

[5] *See id.* § 109(d)(1) (emphasis added).

[6] *Id.* § 307(b)(1).

[7] *Id.* § 307(e) (emphasis added).

limited to a narrow class of cases. Section 304(a)(2) of the Act permits a person to bring such a claim to a district court only where the Administrator has failed to perform an "act or duty which is *not discretionary* with the Administrator" (emphasis added).

B. EPA's Review of the NAAQS for Sulfur Oxides

This proceeding involves EPA's ongoing efforts to keep up to date on emerging scientific data regarding the effects of sulfur oxides on public health and welfare.

Pursuant to § 109, the EPA Administrator originally promulgated ambient standards for sulfur oxides in 1971.[8] These standards were based on a summary of available scientific data (referred to as an "air quality criteria document")[9] that addressed, *inter alia*, the possible adverse effects of this substance on the public welfare, including possible adverse effects on materials,[10] vegetation,[11] and visibility.[12]

Since the late 1970s, the Administrator has more or less continuously reviewed the air quality criteria and standards for sulfur oxides. In 1979, the EPA Administrator announced that he was reviewing, pursuant to § 109(d)(1), the scientific basis for the standards.[13] This review resulted in the completion in 1982 of a revised criteria document addressing both sulfur oxides and particulate matter, another air pollutant regulated under § 109. EPA also prepared an addendum evaluat-

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[8] 36 Fed. Reg. 1502, 5867, 8186 (1971).

[9] *See id.* at 1502 col. 2.

[10] U.S. Dep't of Health, Educ., & Welfare, National Air Pollution Control Admin. (NAPCA), NAPCA Pub. No. AP-50, *Air Quality Criteria for Sulfur Oxides*, 51-56 (1970).

[11] *Id.* at 61-68.

[12] *Id.* at 9-15.

[13] *See* 53 Fed. Reg. 14928 col. 2 (1988); 44 Fed. Reg. 56730 col. 2 (1979).

ing additional scientific studies, and in 1984 issued the revised criteria document with the addendum.[14]

These review documents addressed, *inter alia*, acid deposition, visibility impairment, and the sources, physical and chemical properties, and possible health and welfare effects of the pollutants.[15] The EPA Administrator in 1984 decided, based on these documents, that no revision of the secondary sulfur oxides standard was appropriate.[16]

The EPA Administrator in 1984 began a further review of additional scientific data on sulfur oxides. On the basis of that review, he concluded in 1986 that revision of the secondary sulfur oxides standard was not appropriate.[17] That conclusion was later reflected in a *Federal Register* notice,[18] which observed that the current standard was "necessary and adequate" to protect against harm to vegetation,[19] and that, based on the available scientific evidence, it would not be appropriate

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[14] *See* 53 Fed. Reg. 14928 cols. 2-3 (1988); 49 Fed. Reg. 10408 (1984).

[15] *See* 53 Fed. Reg. 14940 col. 1-14942 col. 1 (1988).

[16] *Id.* at 14929 col. 2; Defendants' Answers to First Set of Interrogatories at 11, March 6, 1986 (answers 18 and 18a) (hereinafter "Defendants' Answers"), App. 63a-67a. For example, EPA concluded in 1984 that "[a] lack of quantitative cause and effect data, in itself, defines the state of knowledge in many of the research areas" regarding acid deposition. EPA, *The Acidic Deposition Phenomenon and Its Effects: Critical Assessment Review Papers* (July 1984), Vol. II, at p. 1-1. Based on his concurrent review of information regarding the effects of sulfur oxides emissions on visibility, the Administrator explained that available information was insufficient to allow him to decide whether visibility impairment associated with fine particles was an "adverse effect" on the "public welfare," or whether the current secondary standards for particulate matter (as opposed to sulfur oxides) were not "requisite to protect" the public welfare. *See* CAA § 109(b)(2); 52 Fed. Reg. 24670-71 (1987).

[17] Defendants' Answers at 11 (answers 18 and 18a), App. 63a-67a.

[18] 53 Fed. Reg. 14926 col. 1 (1988).

[19] *Id.* at 14931 col. 2.

to revise the standard to address welfare effects such as acid deposition.[20]

In sum, the ambient standard program has been characterized by evolving scientific data and analyses. The EPA Administrator has reviewed that information more or less constantly since the late 1970s. Where the EPA Administrator has found that revisions are appropriate—as he did recently in the case of the particulate matter ambient standards—he has undertaken notice and comment rulemaking to revise the standards.[21] Where he has found no need for a change in the status quo, he typically has not undertaken rulemaking to evaluate the validity of the existing standards.[22]

C. The Proceedings Below

EPA's ongoing review of the sulfur oxides ambient standards has provided a wealth of scientific information on the potential health and welfare effects of sulfur oxides. As with any complex data, however, these data are subject to varying interpretations.

Exercising the discretion given it by Congress, EPA decided in 1984 and again in 1986, based on its review

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[20] *Id.* at 14935 col. 3-14936 col. 2. The Administrator noted that his science advisers (the Clean Air Scientific Advisory Committee, or "CASAC") had "concluded that acidic deposition is a topic of extreme scientific complexity because of the difficulty in establishing firm quantitative relationships between emissions of relevant pollutants, formation of acidic wet and dry deposition products, and effects on terrestrial and aquatic ecosystems." *Id.* at 14935 col. 3. The Administrator also noted that CASAC had found that "acidic deposition involves, at a minimum, several different criteria pollutants—oxides of sulfur, oxides of nitrogen, and the fine particulate fraction of suspended particles." *Id.* at 14936 col. 1.

[21] *See* Revisions to the National Ambient Air Quality Standards for Particulate Matter, 52 Fed. Reg. 24634 (1987) (codified at 40 C.F.R. § 50.6 (1988)); Proposed Revisions to the National Ambient Air Quality Standards for Particulate Matter, 49 Fed. Reg. 10408 (1984).

[22] But see 53 Fed. Reg. 14926 (1988), where the Administrator solicited public comments on his most recent decision not to revise the sulfur oxides standards.

of these data, that revisions to the existing standards were not appropriate.[23] Respondent EDF disagreed with this conclusion. Rather than petitioning EPA to conduct a rulemaking to revise the existing regulations in light of EDF's interpretation of the scientific data, however, EDF in 1985 sued the Administrator in the district court under § 304(a)(2) of the Act.

1. *The District Court Suit*

EDF argued to the district court that it should (1) review the information developed by the Agency and its science advisers regarding acid deposition and visibility, (2) find that this information established adverse effects against which the current regulations do not afford protection, and (3) order the EPA Administrator to undertake rulemaking to revise the current standards to take these effects into account.[24]

In response, the district court dismissed EDF's complaint. That court noted that suits against the Administrator can be brought under § 304(a)(2) of the Act only where the Administrator has failed to perform a specific, clear-cut nondiscretionary act or duty required by the Act.[25] The court held that § 109 does *not* impose on the Administrator any nondiscretionary duty to revise the ambient standards based on his review of complex scientific data. EDF's means of relief under the Clean Air Act, therefore, would be to petition the EPA Administrator to revise the sulfur oxides standards.[26]

2. *The Second Circuit Decision*

On appeal, EDF argued that the district court was wrong in concluding that it had no jurisdiction to review

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[23] *See supra* pp. 5-7.

[24] *See Environmental Defense Fund v. Thomas*, No. 85 Civ. 9507 (S.D.N.Y. April 19, 1988), App. 22a.

[25] *See* App. 31a.

[26] *See* App. 32a-34a & n.4, 39a-43a.

information developed by the Agency and its science advisers, and on that basis to order the Administrator to undertake rulemaking to revise the NAAQS to address acid deposition and visibility effects.[27] In response to EDF's argument, the Second Circuit held that "[a]lthough the district court does not have jurisdiction to order the Administrator to make a particular revision," it "*does have jurisdiction to compel the Administrator to make some formal decision*" regarding whether NAAQS must be revised to address the effects alleged by EDF.[28] On this basis, the Second Circuit remanded the case to the district court "to compel the Administrator to take some formal action, *employing rulemaking procedures, see Thomas v. State of New York*, 802 F.2d 1443 (D.C. Cir. 1986) [(opinion by Scalia, J.)], either revising the NAAQS or declining to revise them." [29]

The Second Circuit's decision therefore stands for the proposition that, under the Clean Air Act, district courts can review scientific data and order the Agency to engage in rulemaking based on the results of that review.[30] While district courts may not dictate whether the Agency must revise the standard, they may tell the Agency *when* to undertake rulemaking to determine the need for standard revisions and *what* the topics of that rulemaking must be (*e.g.*, in this case, rulemaking on acidic deposition and visibility).[31]

The Second Circuit based its decision in large part on its concern that to find no district court jurisdiction would "leav[e] the matter [i.e., EPA's informal decision

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[27] *See Environmental Defense Fund v. Thomas*, 870 F.2d 892, 896 (2d Cir. 1989), App. 9a.

[28] *Id.* at 900, App. 17a (emphasis added).

[29] *Id.*, App. 18a (emphasis added).

[30] According to the panel majority, "[t]he 1982 criteria and the 1984-1985 'Critical Assessment' triggered a duty on the part of EPA to address and decide whether and what kind of revision is necessary." *Id.* at 900, App. 17a.

[31] *See id.* at 395-96, 900, App. 6a-8a, 17a.

not to revise the NAAQS for sulfur oxides] in a bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court." [32] According to the Second Circuit, EDF did not have available the alternative suggested by the district court of petitioning the Administrator for revision of the standards, because the 1977 Amendments to the Clean Air Act made a district court suit the appropriate avenue of relief.[33]

In a dissenting opinion, Judge Mahoney sharply disagreed with the panel majority. According to Judge Mahoney, "the procedure outlined in *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), [a petition to the Agency for revision of standards] was available to the plaintiffs here." [34] Under this procedure, a party seeking revision of a standard would present information justifying the revision to the Agency. In response to such a petition, the Agency might grant the petition, avoiding the need for judicial relief. If the Agency denied the petition, the U.S. Court of Appeals for the District of Columbia Circuit would have jurisdiction to review the Agency's denial.[35]

As a result, Judge Mahoney concluded that plaintiffs have a forum—the Agency—in which to present their claims regarding standard revisions. On the other hand, the Clean Air Act, he concluded, does *not* allow a district court to review evidence presented by a plaintiff and to compel the Agency to undertake a rulemaking regarding the need for standard revisions.[36]

A timely petition for rehearing was filed after the panel's decision, and was denied over Judge Mahoney's dissent. Alabama Power Company, *et al.*, now seek a

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[32] *Id.* at 900, App. 17a.

[33] *Id.* at 897 & n.1, App. 10a-11a & n.1.

[34] *Id.* at 900-01, App. 19a.

[35] *Id.* at 901, App. 19a.

[36] *See id.* at 901-02, App. 20a-21a.

writ of certiorari from this Court to resolve the important issues of administrative law presented by this decision.

REASONS FOR GRANTING THE PETITION

Unless specifically exempted by statute, an agency must comply with the Administrative Procedure Act when it makes rules. Absent a specific requirement in its organic statute, however, an agency's adherence to rulemaking procedures is not required when the agency reexamines its existing rules and decides to leave them in place.

Congress can impose rulemaking procedures on any agency conduct that it believes merits such formality—even on the day-to-day review of new scientific information. Congress has not done so with respect to EPA's review of scientific information underlying the national ambient air quality standards and the threshold decision whether or not revisions to those standards are needed.[37]

The panel below, however, decided that whenever EPA reviews new scientific information to determine whether the Agency's current standards are up to date, the Agency must conduct notice and comment rulemaking with respect to each and every potentially adverse effect identified by the court and, as to each effect, make a formal decision either to revise the standards or to maintain the status quo. According to the Second Circuit, this duty to proceed by notice and comment rulemaking is not discretionary with the Administrator, and it can be enforced by a district court based on the plaintiff's description of potential inadequacies in the standards.

If allowed to stand, the Second Circuit's decision will frustrate agencies' ability to respond to evolving scientific information by requiring continuous rulemaking proceedings on decisions not to change agency rules. Moreover, it will place district courts at the center of the administrative process, allowing them to dictate the need for and scope of agency rulemaking in light of emerging

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[37] *See* CAA § 109(d)(1).

scientific data, and to impose their choice of issues on which the agency must conduct rulemaking. Finally, the opinion below is in direct conflict with the decisions of the Court of Appeals for the District of Columbia Circuit in *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), and *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), and with the decisions of other circuits that have adopted these cases. The opinion below also contravenes the principles announced by this Court in its landmark decisions in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), and *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

I. The Second Circuit Decision Requiring Notice and Comment Rulemaking on Agency Decisions Not To Change Existing Regulations Is Inconsistent with This Court's Decision in *Vermont Yankee* and with Basic Principles of Administrative Law Regarding the Relationship of Federal Courts and Agencies.

In this case, the Second Circuit decided that where EPA reviews recent scientific data and decides to retain its existing regulations, district courts "have jurisdiction to compel the Administrator to take some formal action, employing rulemaking procedures," on the threshold question whether or not revisions to the regulations are needed.[38] There is no basis in either the APA or the Clean Air Act for this assertion of judicial power regarding the procedures an agency must follow in determining whether or not to change its existing regulations.

It is axiomatic that, as scientific knowledge advances, the factual and policy predicates for regulation may change. Congress recognized this and addressed it specifically in the context of the Clean Air Act. With respect to the ambient air quality standards program, Congress provided that the Administrator was to exercise his "judg-

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[38] *Environmental Defense Fund v. Thomas*, 870 F.2d at 900, App. 18a.

ment" to establish regulations that are "requisite to protect" the public health and welfare, based on his review of relevant scientific evidence.[39]

Once regulations have been promulgated, an agency is expected to remain informed as to the evolving facts and circumstances pertinent to its regulations, and to review and to revise the regulations when it deems that appropriate.[40] Congress directed the EPA Administrator, for example, to review the basis for the NAAQS at least every five years, and to revise those standards "as appropriate." [41]

Where agencies decide to revise standards based on their review of new information, the APA and organic statutes such as the Clean Air Act require them to conduct notice and comment rulemaking.[42] An agency's informal review of evolving scientific information to determine *whether or not* to revise its existing regulations, however, is not rulemaking, just as a decision to maintain the status quo is not a "rule." [43] Thus, the fact that Congress intended agencies to keep up to date on the factual and policy predicates for their rules does not

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[39] *See* CAA §§ 108(a), 109(b).

[40] As the D.C. Circuit has observed, EPA is

> charged with evaluating the effects of unprecedented environmental modifications, often made on a massive scale. Necessarily, they must deal with predictions and uncertainty, with developing evidence, with conflicting evidence, and sometimes, with little or no evidence at all.

Ethyl Corp. v. EPA, 541 F.2d 1, 6 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976). Given the environment in which agencies must operate, "administrative law tends to allow a great variety of factfinding procedures from which the correct one can be applied to a particular program." C. Koch, *Administrative Law and Practice* § 1.24, at 44 (1985).

[41] CAA § 109(d)(1).

[42] *See supra* pp. 3-4.

[43] A decision to maintain the status quo is not a "statement of future effect . . . designed to implement . . . law or policy"—the definition of a "rule" under the APA. 5 U.S.C. § 551(4) (1988).

mean that Congress intended agencies to conduct constant rulemaking on decisions not to change their rules.[44]

To the contrary, if there is no "rule" that changes the rights and responsibilities of regulated parties, the reasons for rulemaking (i.e., notice to parties and public comments to agencies)[45] simply are not present. Moreover, it makes little sense to burden an agency with a multitude of formal proceedings whenever the agency must keep up to date on evolving scientific and policy concerns.[46] This is especially the case where a party can seek revocation or revision of a regulation through a petition for agency action to which, under the APA, the agency must respond within a reasonable time.[47]

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[44] *Cf. Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983) ("No regulatory scheme is perfect, and the agency's decision to refrain from amending the elaborate established regulatory scheme cannot be disturbed absent a strong showing that such action was unreasonable."); *Natural Resources Defense Council v. SEC*, 606 F.2d 1031, 1045 (D.C. Cir. 1979) ("Requiring an agency to defend in court its decision not to adopt proposed rules will divert scarce institutional resources into an area that the agency in its expert judgment has already determined is not even worth the effort already expended.").

[45] *See, e.g., Chocolate Mfrs. Ass'n of United States v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) ("The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking."); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980).

[46] As this Court observed in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543 (1978), administrative agencies " 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' [Citation omitted]." *See also supra* note 40.

[47] 5 U.S.C. §§ 555(b), 706(1) (1988); *see infra* note 58. On the other hand, an agency would have discretion to review evolving science through rulemaking in those cases where it thought this type of procedure would be beneficial. *See supra* notes 40 & 46. Thus, that EPA has solicited comments with respect to the adequacy of the existing sulfur oxides standards, *see supra* note 22,

Requiring the EPA Administrator to conduct notice and comment rulemaking for a decision not to revise a regulation flatly contradicts the well-established principle that rulemaking procedures are required *only* for substantive rules that change existing law or policy.[48] In this regard, the definition of a substantive rule that triggers rulemaking requirements is already the subject of some confusion among the circuits.[49] The Second Circuit decision will create further confusion among the circuits

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does not mean that it must conduct rulemaking in every case where it reviews the adequacy of its existing standards. Nor does it mean that the Agency must complete rulemaking on every issue on which it has solicited comments.

[48] *See* Senate Committee on the Judiciary, 79th Cong., 2d Sess., *Administrative Procedure Act—Legislative History* at 18, 19 (1946). Section 552 requires notice for "substantive" rules. 5 U.S.C. § 552(a)(1)(D) (1988). The legislative history of the APA states that § 553 rulemaking procedures apply "only to the type of rules for which notice is required by []section [552] . . . —that is, substantive rules." *Id.* at 19. *See also Guadamuz v. Bowen*, 859 F.2d 762, 771 (9th Cir. 1988) (No rulemaking requirement exists if a rule "does not change any existing law or policy, . . . [or] remove any previously existing right of claimants or their attorneys."); *Brecker v. Queens B'nai B'rith Housing Development Fund Co., Inc.*, 798 F.2d 52, 56 (2d Cir. 1986) (No publication requirement exists where the agency action "did not constitute a change in [the agency's] position."); *General Motors v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985) (Rulemaking is not required because "the rule did not create any new rights or duties; instead, it simply restated the consistent practice of the agency.").

[49] The definition of a substantive rule has evolved through case law. Frustrated courts have described the resulting law on when a rule is subject to rulemaking proceedings as "enshrouded in considerable smog," *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975), or "akin to wandering lost in the Serbonian bog," *Jean v. Nelson*, 711 F.2d 1455, 1480, *reh'g granted*, 714 F.2d 96 (11th Cir. 1983). For a summary of the numerous approaches adopted by courts to defining a substantive rule, *see* Annotation, *Exceptions Under 5 USC § 553(b)(A) and § 553(b)(B) to Notice Requirements of Administrative Procedure Act Rule Making Provisions*, 45 A.L.R. FED. 12 (1979).

as to when rulemaking is required by the Administrative Procedure Act.[50]

Moreover, by expanding the rulemaking requirement, the Second Circuit decision is directly contrary to this Court's teaching in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,[51] as to the proper relationship between courts and agencies on questions of agency procedure. Since neither the Clean Air Act nor the APA requires EPA to conduct notice and comment rulemaking when it decides to maintain the status quo, a court may not impose such a requirement on the EPA Administrator.[52] Certiorari should be granted to clarify

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[50] In this regard, the Second Circuit cited then-Judge Scalia's opinion for the court in *Thomas v. State of New York*, 802 F.2d 1443 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), in finding that rulemaking procedures must be employed here. *Environmental Defense Fund v. Thomas*, 870 F.2d at 900, App. 18a. That opinion has no relevance here. It holds only that if an agency wants to bind itself to take discretionary action in the future, it can do so only through rulemaking. *See* 802 F.2d at 1447.

[51] 435 U.S. at 544. *Cf. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983); *Robertson v. Methow Valley Citizens Council*, 490 U.S. ——, 104 L.Ed.2d 351 (1989).

[52] In this regard, the Second Circuit's decision is also inconsistent with the basic thrust of this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, a reviewing court looks first to "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In the instant case, there is nothing in the language or legislative history of the Clean Air Act that speaks directly to whether the agency is required to undertake notice and comment rulemaking on a decision not to revise an ambient air quality standard. The question for the court, therefore, should have been whether the agency's construction of the statute was a permissible one. The Second Circuit, however, did just what this Court instructed it *not* to do, and "simply [imposed] its own construction of the statute" on the Agency. *Id. See Environmental Defense Fund v. Thomas*, 870 F.2d at 897-98 n.1 ("We believe that the

the applicability of *Vermont Yankee* where agencies decide to maintain the status quo.[53]

Beyond creating new rulemaking obligations for agencies, the Second Circuit decision gives the district courts an unprecedented role with respect to implementation of the Clean Air Act. That is, this decision allows district courts to tell the Agency when and under what terms it must conduct rulemaking regarding new scientific data based on the court's review of documents such as "[t]he 1982 criteria and the 1984-1985 'Critical Assessment.'" [54]

Congress' grant of jurisdiction to district courts under § 304(a)(2) of the Clean Air Act, however, is "undisputedly limited" [55] and "narrowly defined." [56] By allowing petitioners to bypass the agency and to argue to a district court that new information on an alleged potential effect creates a nondiscretionary duty for the agency to

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'specified action' under this section is the making of *some* decision . . . . To the extent that the 'specified action' is simply the making of *some* decision," district court jurisdiction would exist.) (emphasis in original), App. 12a.

[53] In *Batterton v. Marshall*, 648 F.2d 694, 709 (D.C. Cir. 1980), the D.C. Circuit held that *Vermont Yankee* constrained a reviewing court from requiring procedures beyond those set forth in § 553, but did not limit a court's power to require § 553 procedures in a case where the statute was silent as to whether rulemaking procedures were intended by Congress. This is the only interpretation of *Vermont Yankee* that might support the Second Circuit's decision in the instant case. It is, however, an unwarranted narrowing of the broad principle established in *Vermont Yankee* that a reviewing court should defer to an agency's choice of procedures, provided the agency has "employed at least the statutory minima." 435 U.S. at 548. This Court should grant certiorari to clarify the extent of the principle enunciated in *Vermont Yankee*.

[54] *See Environmental Defense Fund v. Thomas*, 870 F.2d at 900, App. 17a.

[55] *Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987).

[56] *Wisconsin Environmental Decade, Inc. v. Wisconsin Power and Light Co.*, 395 F. Supp. 313, 321 (W.D. Wis. 1975).

conduct rulemaking on that potential effect,[57] the Second Circuit decision violates the separation of powers principle. That is, it would permit federal courts, rather than the agencies to which Congress has delegated primary jurisdiction to administer the Act, to dictate rulemaking based on the courts' review of evolving scientific data.[58]

In sum, by creating new rulemaking obligations governing agency review of evolving scientific data and by giving district courts a central role in the administrative process, the Second Circuit decision represents an abrupt departure from the traditional rules governing agency action and conflicts with the decisions of other circuits and of this Court. For these reasons, it is important that certiorari be granted to address this decision.

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[57] As Judge Mahoney explains, the majority opinion concluded that a formal decision whether to revise the standard was required "[i]n view of" a revised criteria document and other new information the agency had produced. *See Environmental Defense Fund v. Thomas*, 870 F.2d at 901 n.2 (Mahoney, J., dissenting). Under the majority's decision, therefore, district courts would review the merits of a request for rulemaking in deciding whether a nondiscretionary duty to act exists. This newly created district court jurisdiction will create uncertainty for agencies that must act in light of evolving scientific data.

[58] The Supreme Court has long admonished the judiciary to respect "the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon courts under Article 3 of the Constitution," noting that federal courts possess only a limited supervisory province as to agencies. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940). *See also Carpet, Linoleum and Resilient Tile Layers v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981) ("to the extent a statute vests discretion in a public official, his exercise of that discretion should not be controlled by the judiciary. The doctrine of separation of powers precludes the judiciary's arrogation of authority as a 'super agency' controlling or overseeing the discretionary affairs of an agency"); *Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1180 (D.C. Cir. 1979) (Leventhal, J., concurring), *cert. denied*, 447 U.S. 921 (1980).

II. The Second Circuit Decision Conflicts with Decisions of Other Circuits as to the Permissible Means for Seeking Revision of Existing Regulations, and for Obtaining Judicial Review of EPA Decisions Not To Conduct Rulemaking on the Adequacy of Existing Regulations.

The Second Circuit's decision to require notice and comment rulemaking reflected the majority's belief that if the Agency were not required to make a formal decision through rulemaking that its existing standards are adequate, the adequacy of those standards would be left "in a bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court." [59] Granting a district court jurisdiction to order rulemaking was necessary, the court believed, to force the Agency to take final action that would be reviewable in the D.C. Circuit under § 307 of the Act.[60]

The Second Circuit's conclusion that, without district court jurisdiction, plaintiffs would have no forum to air their claims is inconsistent with the law of other circuits, and will disrupt the administrative process by allowing judicial review before the agency has had an opportunity to develop an administrative record.

When the EPA Administrator promulgates regulations under the Clean Air Act, those regulations are subject to judicial challenge within 60 days after promulgation, unless the grounds for review arise after the expiration of this period.[61] The review takes place within the confines of the record developed by the agency.[62] Reflecting the primary jurisdiction that Congress granted agencies to resolve complex, technical questions, the record on judicial review must reflect the agency's response to the

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[59] *Environmental Defense Fund v. Thomas*, 870 F.2d at 900, App. 17a.

[60] *Id.*

[61] CAA § 307(b)(1).

[62] *See, e.g., PPG Industries, Inc. v. Costle*, 659 F.2d 1239, 1241 (D.C. Cir. 1981).

arguments of those seeking review, as well as the agency's explanation of its action.[63]

Principles of primary jurisdiction and the need for an administrative record for a court to exercise its judicial review function preclude parties from seeking post-sixty-day judicial review on the basis of information and arguments not presented to the agency in a petition for rulemaking. This requirement was originally enunciated by the D.C. Circuit in *Oljato Chapter of the Navajo Tribe v. Train.*[64] The Second Circuit, however, concluded in the present case that the *Oljato* procedure is not available under the Clean Air Act in the wake of the 1977 Amendments to the Act. In the words of the panel majority, the *Oljato* procedure is only "dictum" and in any event is "obsolete" after those Amendments.[65]

As Judge Mahoney recognized in his dissent, however, the *Oljato* court's holding that the petition for rulemaking procedure was mandatory was not dictum.[66] Furthermore, contrary to the assertion of the panel majority, the *Oljato* procedure was endorsed, not rejected, by Congress when it amended the Act in 1977.[67]

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[63] *See* CAA § 307(d)(6).

[64] 515 F.2d 654 (D.C. Cir. 1975).

[65] *Environmental Defense Fund v. Thomas*, 870 F.2d at 897 n.1, App. 11a n.1.

[66] *Id.* at 900-01 & n.1 (Mahoney, J., dissenting), App. 19a-20a & n.1. Indeed, this procedure was "mandated" by the D.C. Circuit and therefore was not dictum. The petition for review in *Oljato* was dismissed specifically for failure to follow that procedure. 515 F.2d at 668.

[67] The Second Circuit was plainly wrong when it held that the *Oljato* procedure was made obsolete when Congress enacted § 109(d) as part of the 1977 Clean Air Act Amendments. Nothing in the language of the 1977 Amendments supports the Second Circuit's holding. Moreover, the House report accompanying the House bill that proposed to add § 109(d) explicitly states that "the committee bill confirms the court's decision in *Oljato*." H.R. Rep. No. 294, 95th Cong., 1st Sess. 323 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News 1077, 1402.

As a result, other circuits have explicitly adopted the *Oljato* scheme *subsequent to* the 1977 Clean Air Act Amendments. *See, e.g., Group Against Smog and Pollution, Inc. v. U.S. EPA*, 665 F.2d 1284, 1290 (D.C. Cir. 1981) (The *Oljato* scheme is "explicitly endorsed."); *State of Maine v. Thomas*, 874 F.2d 883, 889-90 (1st Cir. 1989) ("We approve the procedures suggested" by the "entrenched precedent" of the *Oljato* decision.); *Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 812 (9th Cir. 1980) (Kennedy, J.). Indeed, the Second Circuit is the *only* court to reject application of this doctrine.

The *Oljato* decision confirms that Congress, in granting district courts jurisdiction under § 304 of the Act to compel nondiscretionary duties, did *not* change the basic procedure for obtaining review of the adequacy of existing standards. That is, a petitioner must seek standard revisions from the agency.[68] Judicial relief with respect to the adequacy of existing standards (and consequently the obligation of an agency to conduct rulemaking on the adequacy of those standards) is appropriate only in the D.C. Circuit after the Agency has had an opportunity to act on a petition for rulemaking, and not in the district court before a petition is filed.[69]

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[68] Each agency is required by the APA to provide a mechanism for interested persons to petition for the issuance, amendment, or repeal of a rule, and to give prompt notice of a denial of such a petition. 5 U.S.C. §§ 553(e), 555(e) (1988). As the *Oljato* court recognized, the rulemaking petition procedures mandated by the D.C. Circuit in *Oljato* simply reflect the APA requirements. *Oljato*, 515 F.2d at 666.

[69] *See* CAA §§ 307(b)(1), 307(e). It is well established that an adequate record for review of a denial of a rulemaking petition is created by the rulemaking petition and the agency's explanation of its decision on the petition. *See WWHT, Inc. v. FCC*, 656 F.2d 807, 817-18 (D.C. Cir. 1981); *United States Brewers Ass'n, Inc. v. EPA*, 600 F.2d 974, 979 (D.C. Cir. 1979). *See also* W. Rodgers, 1 *Environmental Law: Air and Water* § 3.4, at 209 (1986) (An agency's rejection of a rulemaking petition under the *Oljato* procedure will "be deliberate, informed, with reasons laid out as would be the case where action is taken.").

Rejecting the *Oljato* procedure, as the Second Circuit has done, would leave courts with no record on which to review the need for rulemaking on standard revisions, and with no agency decision to use in evaluating that record. Rather, allegations of a plaintiff would form the basis for review and for an order compelling rulemaking.[70] Facts alleged by a plaintiff based on its view of evolving science are simply not a substitute for a record developed by an agency in response to a rulemaking petition.

For these reasons, the Second Circuit's rejection of *Oljato* conflicts with the law of other circuits, and will create confusion as to how to gain review of the adequacy of existing regulations. This Court should grant certiorari to resolve this conflict.

III. Requiring Agencies To Follow Rulemaking Procedures Before Making a Decision To Maintain Existing Regulations Will Frustrate Implementation of the Clean Air Act and Similar Regulatory Statutes, and Will Conflict with the D.C. Circuit's Decision in *Telecommunications Research and Action Center v. FCC.*

Agencies charged with implementing complex statutory provisions of necessity review the scientific predicates for their regulatory decisions on a periodic basis.[71] Such review may lead to the revision of standards, in which case the agency undertakes rulemaking. On the other hand, the review may result in a decision to maintain the status quo, and no rulemaking will take place.

As discussed above, the Second Circuit decision would change how agencies operate in the face of evolving science. Rather than permitting the agency the flexibility needed to review changing information on an informal basis, the Second Circuit decision would require the agency to undertake rulemaking to address alleged potential in-

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[70] *See supra* notes 30, 57.

[71] *See supra* pp. 12-13.

adequacies identified by a district court. For the following reasons, this approach would disrupt the implementation of the Clean Air Act and similar regulatory statutes.

Under the Second Circuit decision, an agency would no longer be able to monitor new information as it arises, and engage in rulemaking only when it concludes that new information justifies regulatory changes. Rather, the agency would be required to engage in rulemaking prior to each determination that a revision of the existing standards is not warranted. The amount of rulemaking required under this decision would place an impossible burden on agencies, especially in light of the many important rulemaking obligations already confronting agencies such as EPA.[72]

This Court has consistently counseled against judicial intrusion into an agency's ordering of its priorities.[73] By radically expanding the rulemaking obligations of agencies, this decision will cause precisely the result against which this Court has cautioned.

Besides imposing substantial new and unnecessary rulemaking burdens on agencies, this decision will lead to jurisdictional conflicts regarding implementation of complex regulatory programs. Recognizing the potential of district court jurisdiction to disrupt the agency's im-

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[72] Requiring repetitive rulemaking on decisions not to revise existing standards would detract from agencies' performance of these obligations.

[73] *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."); *Heckler v. Day*, 467 U.S. 104, 116 (1984). *See also, e.g., Natural Resources Defense Council v. SEC*, 606 F.2d at 1056 (The agency "alone is cognizant of the many demands on it, its limited resources, and the most effective structuring and timing of proceedings to resolve those competing demands. An agency is allowed to be master of its own house, lest effective agency decisionmaking not occur in *any* proceeding; and judicial review awaits the agency's conclusion of its proceedings.") (emphasis in original).

plementation of the Act, Congress created district court jurisdiction under § 304 only in situations where the Administrator has failed to carry out a duty clearly required on the face of the statute.[74] By contrast, circuit court jurisdiction under the Clean Air Act is broadly defined to cover "any . . . final action" of the Administrator.[75]

To avoid conflicts between district court jurisdiction and court of appeals jurisdiction with respect to agency regulations, the D.C. Circuit and the Ninth Circuit have adopted an explicit rule that "any suit seeking relief that might affect the Circuit Court's future jurisdiction [to

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[74] *See, e.g., A Legislative History of the Clean Air Amendments of 1970* (Comm. Print, Senate Comm. on Public Works (1974)) (Serial No. 93-18) at 112 ("[C]itizen suits against the Administrator will be limited to those duties which are mandatory under the legislation and the suits will not extend to those areas of enforcement with regard to which the Administrator has discretion.") (statement of Sen. Staggers); *id.* at 147 ("[S]uits against the Administrator of the Environmental Protection Agency are limited to actions in which there is an alleged failure by the Administrator to perform mandatory duties imposed by the statute.") (statement of Sen. Spong).

Consisent with the language of the statute and the Act's legislative history, § 304 jurisdiction has been limited by other circuits to enforcing mandatory duties that are clear on the face of the statute. *See, e.g., Sierra Club v. Thomas*, 828 F.2d at 792 (Section 304 cannot be used to enforce a duty "merely inferred from the overall statutory scheme."); *State of Maine v. Thomas*, 874 F.2d at 888 n.7 (Even nondiscretionary duties are not reviewable under § 304 unless they are "statutory nondiscretionary duties.") (emphasis added); *City of Seabrook v. Costle*, 659 F.2d 1371, 1374, *reh'g denied*, 665 F.2d 347 (5th Cir. 1981) (requiring "a clear statutory mandate" to impose a nondiscretionary duty on the Administrator); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981) (Section 304 jurisdiction is restricted to "actions seeking to enforce specific non-discretionary clear-cut requirements of the Act.").

[75] CAA §§ 307(b)(1); *see also id.* § 307(e) ("Nothing in this Act shall be construed to authorize judicial review of regulations or orders . . . except as provided in this section.").

review agency actions] is subject to the *exclusive* review of the Court of Appeals." [76] The D.C. Circuit has held that the rule of preclusive court of appeals jurisdiction enunciated in *TRAC* applies to cases under the Clean Air Act, thereby confirming that the jurisdiction of district courts under the Act is extremely narrow.[77]

In the instant case, by contrast, the Second Circuit has held that a district court may review facts alleged by a plaintiff and order an agency to conduct rulemaking based on the plaintiff's reading of those facts.[78] This kind of district court review of scientific data to compel final agency action after rulemaking will result in the jurisdictional conflict that the *TRAC* rule seeks to avoid.[79] As Judge Mahoney pointed out, therefore, the Second Circuit's decision *directly contradicts* the *TRAC* rule adopted by the D.C. Circuit and the Ninth Circuit.[80]

In sum, the Second Circuit decision will hinder implementation of the Clean Air Act and similar regulatory

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[76] *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("*TRAC*") (emphasis in original). The D.C. Circuit noted that "this part of our decision has been considered separately and approved by the whole court, and thus constitutes the law of the circuit." *Id.* at 75 n.24. The Ninth Circuit adopted the rule in TRAC, in an opinion by then-Judge Kennedy, in *Public Utility Commissioner of Oregon v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985).

[77] *Sierra Club v. Thomas*, 828 F.2d at 787-93.

[78] *See supra* notes 30, 57.

[79] *See TRAC*, 750 F.2d at 74-75.

[80] *See Environmental Defense Fund v. Thomas*, 870 F.2d at 901-02, App. 21a. Indeed, *TRAC* has been applied to deny district court jurisdiction in cases directly comparable to the instant case in which the relief sought was a district court order compelling an agency to make a final order that would be subject to exclusive appellate review. *See, e.g., Oil, Chemical & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1483 (D.C. Cir. 1985); *Independent Bankers Ass'n of America v. Conover*, 603 F. Supp. 948, 956-57 (D.D.C. 1985).

statutes. Certiorari should be granted to avoid these problems and to resolve the conflict with the *TRAC* rule adopted by the D.C. Circuit and the Ninth Circuit.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

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PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES OF INDIVIDUAL ELECTRIC UTILITIES

(Asterisk indicates an inactive entity.)

Alabama Power Company
(subsidiary of The Southern Company)

subsidiaries:

Alabama Property Company
Columbia Fuels, Inc.

affiliate:

Southern Electric Generating Company

Appalachian Power Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Central Appalachian Coal Company
Kanawha Valley Power Company
Southern Appalachian Coal Company
West Virginia Power Company
Cedar Coal Company

affiliates:

Central Coal Company
Central Operating Company
Ohio Valley Electric Corporation

Baltimore Gas and Electric Company

subsidiaries:

B&G, Inc.
Safe Harbor Water Power Corp.
Constellation Holdings, Inc.

subsidiaries:

Constellation Biogas, Inc.
Constellation Investments, Inc.
Constellation Properties, Inc.
Constellation Development, Inc.
Constellation Operating Services, Inc.
Constellation Real Estate Group, Inc.
Constellation Water Systems, Inc.

Boston Edison Company

Carolina Power and Light Company

subsidiaries:

Capitan Corporation
Carolina Power & Light Finance, N.V.
Leslie Coal Mining Company
McInnes Coal Mining Company

affiliate:

Carolinas-Virginia Nuclear Power Associates, Inc.

Central and South West Corporation

subsidiaries:

Central Power and Light Company
Public Service Company of Oklahoma

subsidiary:

Ash Creek Mining Company

Transok, Inc.
Southwestern Electric Power Company
West Texas Utilities Company
Central and South West Services, Inc.
CSW Financial, Inc.
CSW Energy, Inc.

CSW Leasing, Inc.
CSW Credit, Inc.

Central Hudson Gas and Electric Corporation

subsidiaries:

Phoenix Development Company, Inc.
Greene Point Development Corporation
Central Hudson Enterprsies Corporation
CH Resources, Inc.
CH Cogeneration, Inc.

Central Illinois Light Company
(a subsidiary of CILCORP, Inc.)

subsidiaries:

CILCO Exploration and Development Company
CILCO Energy Corporation

Central Illinois Public Service Company

affiliate:

Electric Energy, Inc.

Central Power and Light Company
(controlled by Central and South West Corporation)

The Cincinnati Gas and Electric Company

subsidiaries:

Union Light, Heat and Power Company
West Harrison Gas & Electric Company
Miami Power Corporation
Lawrenceburg Gas Company
Lawrenceburg Gas Transmission Corporation
Tri-State Improvement Company
YGK, Inc.

affiliate:

Ohio Valley Electric Corporation

Cleveland Electric Illuminating Company
(controlled by Centerior Energy Corporation)

subsidiaries:

CEICO Company
CCO Company
Dynamic Energy Ventures, Inc.

Columbus Southern Power Company
(formerly Columbus and Southern Ohio Electric Company)
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Colomet, Inc.
Simco, Inc.
Conesville Coal Preparation Company

Commonwealth Edison Company

subsidiaries:

Commonwealth Edison Company of Indiana, Inc.
Chicago and Illinois Midland Railway Company
Cotter Corporation
Commonwealth Research Corporation
Edison Development Canada, Inc.
Edison Development Company
Concomber, Ltd.

Consoliated Edison Company of New York, Inc.

Consumers Power Company
(controlled by CMS Energy Corporation)

subsidiaries:

Michigan Gas Storage Company
Northern Michigan Exploration Company

Selective Collection Services, Inc.
Utility Systems, Inc.
Huron Hydrocarbons, Inc.
Jackson Partners, Ltd.
Midland Group, Ltd.

CMS Midland, Inc.
MEC Development Corporation

Plateau Resources, Ltd.

Canyon Homesteads, Inc.

The Dayton Power and Light Company
(controlled by DPL, Inc.)

subsidiaries:

DP&L Commuity Urban Redevelopment Corporation
Miami Valley Development Company

affiliate:

Ohio Valley Electric Corporation

Delmarva Power & Light Company

subsidiaries:

Delmarva Industries, Inc.
Delmarva Services Company
Delmarva Capital Investments, Inc.

subsidiaries:

DCI I, Inc.
DCI II, Inc.
Delmarva Capital Technology, Inc.
Delmarva Capitol Realty Company

Peach Bottom Generating Station

The Detroit Edison Company

subsidiaries:

Edison Illuminating Company of Detroit
Midwest Energy Resources Company

Washtenaw Energy Corporation
St. Clair Energy Corporation
SYNDECO, Inc.

subsidiaries:

SYNDECO Realty Corporation
Utility Technical Services Inc.

Duke Power Company

subsidiaries:

Mill-Power Supply Company
Crescent Land & Timber Corporation
Wateree Power Company*
Catawba Manufacturing and Electric Power Company*
Western Carolina Power Company*
Caldwell Power Company*
Southern Power Company*
Greenville Gas and Electric Light and Power Company
Church Street Capital Corporation
Duke Engineering and Services
Nantahala Power & Light Company

Florida Power & Light Company
(wholly-owned subsidiary of FPL Group, Inc.)

subsidiaries:

Land Resources Investment Company
FPL QualTec, Inc.
Alandco, Inc.

Georgia Power Company
(subsidiary of The Southern Company)

subsidiary:

Piedmont Forrest Company

affiliate:

Southern Electric Generating Company

Gulf Power Company
(subsidiary of The Southern Company)

Illinois Power Company

subsidiaries:

IP, Inc.
IPF Company, N.V.
Illinois Power Fuel Company
IP Gas Supply Company

affiliate:

Electric Energy, Inc.

Indiana Michigan Power Company
(formerly Indiana & Michigan Electric Company)
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Price River Coal Company, Inc.
Blackhawk Coal Company

Indianapolis Power & Light Company
(controlled by IPALCO Enterprises, Inc.)

Iowa Public Service Company
(controlled by Midwest Energy Company)

Kansas City Power and Light Company

subsidiary:

WYMO Fuels, Inc.

affiliate:

Utility Fuels, Inc.

Kentucky Power Company
(controlled by American Electric Power Company, Inc.)

Kentucky Utilities Company

subsidiary:

Old Dominion Power Company

affiliates:

Electric Energy, Inc.
Ohio Valley Electric Corporation

Madison Gas and Electric Company

subsidiaries:

MG&E Nuclear Fuel Inc.
MAGAEL Inc.
MAGAEL Material Resources, Inc.
MAGAEL Communications, Inc.
Waters and Associates
Central Wisconsin Development Corporation
Wisconsin Resources Corporation
North Central Technologies, Inc.
Mid-America Technologies, Inc.

Mississippi Power Company
(subsidiary of The Southern Company)

Monongahela Power Company
(controlled by Allegheny Power System, Inc.)

affiliates:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company
Ohio Valley Electric Company

Northern Indiana Public Service Company
(wholly owned by NIPSCO Industries, Inc.)

subsidiaries:

Shore Line Shops, Inc.
NIPSCO Exploration Company

NIPSCO Fuel Company, Inc.
NIPSCO Energy Services, Inc.

Ohio Edison Company

subsidiaries:

Pennsylvania Power Company
Ohio Edison Finance, N.A.
OES Fuel, Inc.
OES Capital, Inc.

Ohio Power Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Central Ohio Coal Company
Southern Ohio Coal Company
Windsor Coal Company

affiliates:

Central Operating Company
Central Coal Company
Cardinal Operating Company
Ohio Valley Electric Corporation

Ohio Valley Electric Corporation

subsidiary:

Indiana-Kentucky Electric Corporation

Oklahoma Gas and Electric Company

subsidiary:

Enoyex Inc.

affiliate:

Arklahoma Corporation

Pacific Gas & Electric Company

subsidiaries:

Natural Gas Corporation Energy Company

subsidiary:

NGC Production Company

Gas Lines, Inc.
Alberta & Southern Gas Company, Ltd.
Calaska Energy Company
Standard Pacific Gas Lines, Inc.
Pacific Gas Transmission Company

affiliates:

ANGUS Biotech
ANGUS Chemical Company
ANGUS Petroleum Corporation
Alberta Natural Gas Company, Ltd.

affiliates:

ANGUS Biotech
ANGUS Chemical Company
ANGUS Petroleum Corporation
Foothills Pipelines

Alaska California LNG Company
Eureka Energy Company
Mission Trail Insurance (Cayman), Ltd.
Pacific Gas LNG Terminal Company
Pacific Gas Marine Company
Pacific Gas & Electric Gas Supply Company
JWP Land Company
Pacific Gas and Electric Finance Company, N.V.
Alberta Natural Gas Company, Ltd.
Pacific Conservation Services Company
Pacific Horizon Enterprises, Inc.

subsidiaries:

Pacific Energy Services Company
Pacific Transmission Supply Company
Rocky Mountain Gas Transmission Company

Pennsylvania Electric Company
(subsidiary of General Public Utilities Corporation)

subsidiaries:

Nineveh Water Company
The Waverly Electric Light & Power Company

Pennsylvania Power Company
(controlled by Ohio Edison Company)

Pennsylvania Power & Light Company

subsidiaries:

Pennsylvania Coal Resources Corporation

subsidiaries:

Brush Valley Coal Corporation*
Rushton Mining Company
Tunnelton Mining Company
Pemico Incorporated*
Pennsylvania Mines Corporation

CEP Group, Inc.

subsidiary:

Hanover Development Corporation

Interstate Energy Company
Realty Company of Pennsylvania

subsidiaries:

BDW Corporation
LCA Leasing Corporation
Lady Jane Collieries, Inc.
Greene Manor Coal Company
Greene Hill Coal Company

affiliate:

Safe Harbor Water Power Corporation

The Potomac Edison Company
(controlled by Allegheny Power System, Inc.)

affiliates:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company

Potomac Electric Power Company

subsidiaries:

PEPCO Enterprises, Inc.

subsidiary:

Energy Use Management Corporation

Potomac Capital Investment Corporation
PCI Energy Corporation

Public Service Company of Indiana, Inc.
(wholly-owned by PSI Holdings, Inc.)

subsidiary:

South Construction Company, Inc.

Public Service Company of Oklahoma
(controlled by Central & South West Corporation)

subsidiary:

Ash Creek Mining Company

Public Service Electric and Gas Company
(controlled by Public Service Enterprise Group, Inc.)

subsidiaries:

PSE&G Research Corporation
Mulberry Street Urban Renewal Corporation

Salt River Project

Southern California Edison Company
(controlled by SCE Corporation)

subsidiaries:

Associated Southern Investment Company
Energy Services, Inc.
Southern Surplus Realty Company
Calabasas Park Company, Inc.
Mono Power Company

subsidiaries:

Bear Creek Uranium Company
Mono Green Mountain Company

S.C.E. Capital Company
(a subsidiary of Southern California Edison Finance Company, N.V.)
Mission Energy Company
Mission Land Company
Northern Cimarron Resources Company
Mission Financial Management Company
Southern States Realty Company
California Electric Power Company
Conservation Financing Corporation

Southwestern Electric Power Company
(controlled by Central & South West Corporation)

affiliate:

The Arklahoma Corporation

Tampa Electric Company
(controlled by TECO Energy, Inc.)

Toledo Edison Company
(controlled by Centerior Energy Corporation

affiliate:

Ohio Valley Electric Company

Tucson Electric Power Company

subsidiaries:

Valencia Energy Company
Escavada Leasing Company
Tucson Resources, Inc.
Tusconel, Inc.
Sierrita Resources, Inc.
San Carlos Resources, Inc.
Santa Clara Resources, Inc.
Santa Rosa Resources, Inc.
Palomas Securities, Inc.
LRCS L.P.
Catalina Securities, Inc.
Gallo Wash Development Company
Pantano Securities, Inc.
Rincon Blue Lake, Inc.
Rincon Investing Company
Katrena Corporation
Kingswood Partee Association
Stockton Gogen (III) Inc.
Sabino Investing, Inc.
Santa Cruz Resources, Inc.
Santa Rita Energy, Inc.
Santa Rita Jonesboro, Inc.
Santa Rita West Enfield, Inc.

Union Electric Company

subsidiary:

Union Colliery Company

affiliate:

Electric Energy, Inc.

Virginia Power
(formerly Virginia Electric and Power Company)
(controlled by Dominion Resources, Inc.)

subsidiaries:

Laurel Run Mining Company
Dominion Exploration, Inc.

West Penn Power Company
(controlled by Allegheny Power System, Inc.)

subsidiary:

West Virginia Power & Transmission Company

subsidiary:

West Penn West Virginia Water Power Company

affiliates:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company
Ohio Valley Electric Company

West Texas Utilities Company
(controlled by Central & South West Corporation)

Wisconsin Electric Power Company
(controlled by Wisconsin Energy Corporation)

Wisconsin Power and Light Company
(wholly owned by WPL Holdings, Inc.)

subsidiaries:

South Beloit Water, Gas and Electric Company
Wisconsin Power and Light Nuclear Fuel, Inc.
NUFUS Resources, Inc.
Residuals Maangement Technology, Inc.
ENSERV, Inc.

REAC, Inc.
WP&L Holdings, Inc.
WP&L Communications, Inc.

affiliates:

Wisconsin Public Service Corporation
Consolidated Water Power & Paper Company
Wisconsin River Power Company

Wisconsin Public Service Corporation

subsidiaries:

Delores Bench General Partner, Inc.
WPS Development, Inc.
WPS Communications, Inc.

affiliates:

Wisconsin River Power Company
Wisconsin Valley Improvement Company
Wisconsin Power & Light Company
Consolidated Papers, Inc.
Utech Ventures Capital